S. KULASINGAM & ANOR.

v.

COMMISSIONER OF LANDS, FEDERAL TERRITORY & ORS.

FEDERAL COURT, KUALA LUMPUR
SYED OTHMAN FJ
MOHAMED AZMI
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 176 OF 1981]
6 NOVEMBER 1981 & 11 JANUARY 1982

LAND LAW: *Acquisition of land - Whether there is right to pre-acquisition hearing - Natural justice - Justiciability of public purpose - Failure to make notation of intended acquisition on register document of title - Whether provision mandatory or directory - Land Acquisition Act 1960, ss. 3, 8, 9 - Federal Constitution, Article 13.*

In this case a piece of land was compulsorily acquired for a public purpose, that is, for the purpose of building a hockey stadium. The land was vested in the first appellant as trustee for and on behalf of the second appellant and was held under a special condition that it be used solely for the erection of buildings and for a recreation ground for the association. No notation of the intended acquisition was at first made on the register document of title but when the omission was discovered it was rectified. The appellants applied for declarations to impugn the validity of the acquisition but the application was dismissed in the High Court. They appealed to the Federal Court and the appeal was argued on four grounds namely:

(1) that there is a right of a pre-acquisition hearing under the Act in consonance with the rules of natural justice;

(2) in the alternative, that Article 13(1) of the Federal Constitution would render any law providing for deprivation of property without a hearing invalid;

(3) that the question of public purpose is justiciable and the present user of the land already constitutes use for a public purpose and so negates any requirement for compulsory acquisition and that the purported acquisition of the land under s. 3 would amount to deprivation of property which is confiscatory in nature;

(4) that the failure to comply with the provisions of s. 9(1)(b) which are mandatory and not directory vitiated the acquisition purported to have been effected.

The Federal Court dismissed the appeal.

Abdoolcader J who gave the judgment of the Court said that the short answer to the first ground of appeal was that there was nothing in the legislation imposing any obligation for a pre-acquisition hearing in marked contrast to the specific provisions for an inquiry and hearing in respect of the quantum of compensation payable. He referred to the Privy Council case in *Mukta Ben & Anor. v. Suva City Council* [1980] 1 WLR 767, 779, where it was held that the acquisition could not be impugned on any ground of natural justice, since the legislation imposed no obligation to inform the appellants in that case that an application for compulsory acquisition was contemplated or to invite them to make representations to the Governor and that he had in no way acted unfairly in regard to them. The rules of natural justice vary in content and ambit according to the circumstances and context and the learned Judge referred to the English Court of Appeal decision in *Reg. v. Raymond* [1981] 3 WLR 660, 670 which approved the proposition that the courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the *audi alteram partem rule*.

In regard to the second ground of appeal, the learned Judge said it was necessary to consider the connotation of the word "law" in Article 13(1) of the Federal Constitution which stipulates that no person shall be deprived of property save in accordance with law. Reference was made to the Privy Council decision in *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648, 670 where it was held that "law" in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England which was in operation at the commencement of the Constitution. The legislature can however by clear words exclude the principles of natural justice in the absence of specific Constitutional guarantees. On this point Abdoolcader J referred to the Privy Council case of *Furnell v. Whangarei High Schools Board* [1973] AC 660, 679. He pointed out that there was express provision in the Land Acquisition Act 1960, for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself of land needed for the purposes specified in s. 3. The maxim *expressio unius est exclusio alterius* therefore applied. The learned Judge therefore concluded that Article 13(1) of the Federal Constitution in no way vitiates the provisions of the Act in this regard.

In regard to the third ground of appeal, although the decision of the state authority that the land is needed for a public purpose is stated to be final and conclusive it may be possible to treat the declaration as a nullity if it is shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within s. 3 of the Land Acquisition Act or if bad faith can be established. In this case the appellant contended that the present user of the land already constituted user for a public purpose and there can be therefore no requirement for compulsory acquisition for an identical purpose.

Abdoolcader J however pointed out that the special condition of title of the land specifically provides that the land is to be used solely for a recreation ground for the purposes of the association.

In any event even if public sporting events have been held on the land this did not constitute user for a public purpose as the land was vested in a trustee for a private body and any use of the land for public sporting events was at the discretion of the association and subject to the payment of fees and charges.

On the last ground of appeal, the learned Judge **held** that the provisions of s. 9(1) (b) of the Land Acquisition Act are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration. The omission had been remedied and the point raised had become academic. In essence what was impugned in this case was the acquisition purported to be effected by the publication of the declaration and not the subsequent proceedings for an inquiry as to claims for compensation.

Cases referred to:
Mukta Ben & Anor. v. Suva City Council [1980] 1 WLR 767
Reg. v. Raymond [1981] 3 WLR 660
Ong Ah Chuan v. Public Prosecutor [1981] AC 648
Furnell v. Whangarei High Schools Board [1973] AC 660
Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor [1981] CLJ (Rep) 74
Merdeka University Bhd v. Government of Malaysia [1981] CLJ (Rep) 191

Legislation referred to:
Federal Constitution, art. 13(1)
Land Acquisition Act 1960, ss. 3, 9(1)(b)

Other source referred to:
Commentary on the Constitution of India, by Basu, 5th Edn., at p. 190

For the plaintiffs - C.V. Das (John Guruswamy with him); Shook Lin & Bok
For the respondents - Dato Abu Mansor bin Ali, SFC (Lim Heng Seng, FC with him)

JUDGMENT

Eusoffe Abdoolcader J:

This appeal involves the question of the validity of the compulsory acquisition for a public purpose of some 5 acres of land comprised in Lot 5 section 42 in the Town of Kuala Lumpur held under Grant No. 6444 and vested in the first appellant as the sole surviving trustee for and on behalf of the second appellant ('the association'), a society registered under the Societies Act 1966, pursuant to the provisions of the Land Acquisition Act 1960, ('the Act') for the construction of a hockey stadium for the Ministry of Culture, Youth and Sports. The land in question according to the first of the special conditions of title in the grant is to be used solely for the erection of a building or buildings and for a recreation ground for the purposes of the Association but on the affidavit evidence it appears that various public sporting events have also been held there. To avoid repetition and as we are primarily concerned with the Act, all references to statutory provisions in this judgment will be to the Act unless otherwise specifically indicated.

The brief facts of the matter are that the Land Executive Committee of the Federal Territory of Kuala Lumpur, acting under the powers delegated to it by the Yang di-Pertuan Agong, had decided on 24 April 1981, on the compulsory acquisition of the land in question for the purpose we have referred to and initiated the requisite process in implementation thereof. The first respondent accordingly caused to be published in the Federal Government *Gazette* of 21 May 1981, the necessary declaration in Form D under s. 8 and this was followed by the other consequential statutory notices and a certificate of urgency with regard to possession. There was however failure to comply with the provisions of s. 9(1)(b) regarding notation but as soon as this was discovered the omission was rectified and the necessary notation of the intended acquisition made on the register document of title on 28 July 1981.

The appellants took out a summons on 24 July 1981, to impugn the validity of the acquisition and claimed a series of declarations on several grounds to this effect but Hashim Yeop A. Sani J, in a reserved judgment delivered on 11 September 1981 refused all the declarations sought. The appellants then appealed to us against this order but abandoned some of the grounds previously relied on and the appeal was argued on four grounds, namely:

(1) that there is a right of a pre-acquisition hearing under the Act in consonance with the rules of natural justice;

(2) in the alternative, that Article 13(1) of the Federal Constitution would render any law providing for deprivation of property without a hearing, invalid;

(3) that the question of public purpose is justiciable and the present user of the land already constitutes use for a public purpose and so negates any requirement for compulsory acquisition and that the purported acquisition of the land under s. 3 would amount to deprivation of property which is confiscatory in nature;

(4) that the failure to comply with the provisions of s. 9(1)(b) which are mandatory and not directory vitiated the acquisition purported to have been effected.

Before proceeding to consider the four issues reaised we should perhaps make some observation on two matters which have neither been raised nor considered at any stage of these proceedings hitherto. First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act and s. 9(c) thereof specificially provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that is so, then we would

think that if it was at all necessary for the Association to sue jointly as a plaintiff a representative claim by one or more of its office-bearers on behalf of all the members would be the soulution. In any event the comptent person to sue in this matter if the first appellant as the surviving trustee in whom the land is vested.

Second, no consideration appears to have been given hitherto to the special conditions of the title in the Grant. The first of these which have already referred to specifically provides that the land is to be used solely for a recreation ground for the purposes of the Association. It would therefore appear that any public user hitherto would be in breach of the conditions of title. This aspect would also have a material bearing in the third issue raised on behalf of the appellant with regard to the question of public purposes for which is granted the Collector may resume the land. The third special condition specificially empowers resumption of the land on payment of the value of the buildings and improvements only if at any time the land is required for any public purpose. This gain would appear to cut across the third issue raised by the appellants. The relevant authorities have however chosen to proceed under the Act and we accordingly have to consider the matter on that basis but having due regard to the relevance and pertinence of the special conditions we have adverted to in relation to the points taken by the appellants.

The Issues Involved

Turning now to the issues arising for consideration

(1) *Whether there is a right to a pre-acquisition hearing*

Considering the provisions and scheme of the Act, the short answer to this point is that there is nothing in the legislation imposing any such obligation in marked contrast to the specific provisions for an inquiry and hearing in respect of the quantum of compensation payable. This very point was taken before the Privy Council in *Mukta Ben & Anor. v. Suva City Council* [1980] 1 WLR 767, 769 where it was contended *inter alia* that the requirements of natural justice were not observed but the Judicial Committee held (at p. 779) that acquisition could not be impugned on any ground of natural justice, since the legislation imposed no obligation inform the appellants in that case that an application for compulsory acquisition was contemptlated or to invite them to make representations to the Governor and that he had in no way acted unfairly to them. The rules of natural justice vary and ambit according to the circumstances and context *(Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor.* [1981] CLJ (Rep) 74; [1981] 2 MLJ 199*; Merdeka University Bhd. v. Government of Malaysia* [1981] CLJ (Rep) 191; [1981] 2 MLJ 356), and the English Court of Appeal in *Regina v. Raymond* [1981] 3 WLR 660, 670; [1981] 2 All ER 246 (at p. 670) approved the proposition that the Courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the *audi alteram partem rule.*

It is clear that any such right of a pre-acquisition hearing would stultify acquisition proceedings throughout the country and the scheme of the Act would appear in effect to specifically proceed on this basal premise. The Act is based on the Indian Land Acquisition Act 1894, which however was amended in 1923 to give the landowner a pre-acquisition right of hearing: there is no such provision in our Act. The Privy Council held in *Ezra v. Secretary of State for India in Council & Ors* [1905] 32 IA 93 that s. 40 of the Indian Land Acquisition Act 1894, prescribing inquiry by the local Government as to whether a proposed acquisition is needed for a public purpose, does not on its true construction require the presence during that inquiry of the owner of the land, or entitle him to notice thereof.

We cannot therefore accept the argument advanced on this issue and find it to be devoid of merit.

(2) *Whether Article 13(1) of the Federal Constitution renders invalid the provisions of the Act empowering the deprivation of property without a hearing*

We regret we are unable to agree with the learned Judge on his construction of the provisions of clauses. (1) and (2) of Article 13 of the Constitution when he held that they are in effect mutually exclusive. The Privy Council decided in *Government of Malaysia & Anor. v. Selangor Pilot Association* [1977] 1 MLJ 133, 135; [1978] AC 337, 347 that Article 13 cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed as deprivation may take many forms which would naturally include acquisition or use but that those are not the only ways by which deprivation can be effected. We therefore have to consider the connotation of the term 'law' in Article 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 71; [1981] AC 648 said (at p. 670) that 'law' in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to similar written constitutions including ours. We should perhaps add that *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 71; [1981] AC 648 dealt with the question of presumptions and burden of proof.

The Legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell v. Whangarei High Schools Board* [1973] AC 660, 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a school teacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the school teacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at p. 679) that it is not 'the function of the Court to re-draft the code' and referring with approval to the decision of the High Court of Australia in *Brettingham-Moore v. Municipality of St. Leonards* [1969] 121 CLR 509, 524 which held in effect (at p. 524) that it is not for the Court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material. As we have said earlier there is express provision in the Act for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself of land needed for the purposes specified in s. 3. This attracts the application of the maxim *'expressio unius est exclusio alterius'* which has been used to exclude natural justice *(Hulton v. Attorney-Genera* [1927] 1 Ch. 427.

There has hitherto been no pre-existing right of hearing in respect of the acquisition *per se* under the precursors to the Act which it codified and consolidated and we are further fortified in our view by the amendment effected to the provisions of the Indian Land Acquisition Act of 1894 in 1923 for this purpose and also the provisions of s. 8(3) which prescribe that a declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified.

In the light of the principles we have discussed we cannot but conclude that Article 13(1) of the Constitution in no way vitiates the provisions of the Act in this regard.

(3) *Justiciability of public purpose and the effect of the present user of the land*

The conclusive evidence clause in s. 8(3) which we have mentioned in effect provides that the decision of the State Authority that the land is needed for the purpose specified under s. 8(1) is final and conclusive and cannot be questioned (*Wijeyesekera v. Festing* AIR [1919] PC 155). The Privy Council however held in *Syed Omar Alsagoff & Anor. v. Government of the State of Johore* [1979] 1 MLJ 49 (at p. 50) that it may be possible to treat a declaration under s. 8 as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within s. 3 or if bad faith can be established. The purpose of the acquisition can therefore be questioned but only to this extent.

The appellants contend that the present user of the land already constitutes use for a public purpose and there can be therefore no requirement for compulsory acquisition for an identical purpose. We have in this connection earlier referred to the third of the special conditions of title which would appear to cut right across this argument, and if in effect there has currently been a user of the land in question for public purposes, but we do not accept this, this would be unlawful and in breach of the conditions of title in the light of the first and third of the special conditions. In any event even if public sporting events have been held on the land this does not constitute user for a public purpose as the land hitherto was vested in a trustee for a private entity which is governed by its constitution and rules, and any use thereof for public sporting events would and must necessarily be at the discretion of the Association and subject of course to the payment of fees and other charges to it.

In the premises, *cadit quaestio* - the question falls.

(4) *Failure to comply with the provisions of s. 9(1)(b)*

Section 9(1)(b) prescribes that upon the publication of the declaration in Form D pursuant to s. 8 the Collector or other registering authority shall make a note of the intended acquisition under subsection 2(a) thereof upon the register document of title. Section 10(1) provides that the Collector shall, having completed the action required by s. 9, commence proceedings for the acquisition of the land by giving public notice in Form E. In the matter before us the declaration in Form D under s. 8 was gazetted on 21 May 1981, and Form E was issued on 12 June 1981, but the requisite notation under s. 9(1)(b) on the register document of title was entered only on 28 July 1981. The argument posited by the appellants is that the provisions of s. 9(l) are mandatory and failure to comply with them vitiated the acquisition purported to have been effected in view of s. 10(1).

The issue accordingly revolves into the question as to whether the provisions of s. 9(1) are mandatory or directory. We need only refer to *Pow Hing & Anor. v. Registrar of Titles Malacca* [1981] 1 MLJ 155, 157 (at p. 157) with regard to the connotation of this dichotomy, and applying the test laid down in the judgment of this Court in that case for the distinction between mandatory and directory requirements in a statute and having regard to the conclusive evidence clause stipulated in s. 8(3) and the fact that s. 8(1) requires the declaration in Form D to be published in the *Gazette* for general information, we are of the view that the provisions of s. 9(1)(b) are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration in Form D in the *Gazette* under s. 8(1).

This Court has also in *Ng Yit Seng & Anor. v. Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.* [1981] 2 MLJ 194, 195 dealt (at p. 195) with the doctrine of substantial compliance in regard to directory requirements. This has in our view been met in this case as there is no specific

time limit stipulated in s. 9(1) and the omission was in fact repaired and the requisite notation made some two months after the publication of the declaration in Form D. The question raised by this issue would moreover appear to be of academic interest as we are told by Senior Federal Counsel appearing for the respondents that Forms E and F were re-issued *de novo* after judgment in the High Court, and in any event what is in fact and in essence impugned is the acquisition purported to be effected by the publication of the declaration in Form D under s. 8 which is the nub of the objection around which the case for the appellants revolves and not the subsequent proceedings for an inquiry as to claims to compensation.

Conclusion

For the reasons we have given and in the light of the law we have adumbrated we dismissed this appeal with costs at the conclusion of argument and directed the security lodged in Court to be paid out to the respondents to account of their costs.

Also found at [1982] CLJ 65